United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1160

To be argued by
DONALD F. COPELAND

United States Court of Appeals

For the Second Circuit

DAIRYLEA COOPERATIVE, INC.,

Plaintiff-Appellant,

against

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

Defendant-Appellee,

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

Intervenor-Appellee.

BRIEF FOR INTERVENOR-APPELLEE

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Preliminary Statement

The case is on appeal from a judgment of the United States District Court for the Southern District of New York dated November 26, 1973 against Plaintiff-Appellant Dairylea Cooperative, Inc. ("Dairylea"), dismissing its com-

plaint against the Defendant-Appellee the Secretary of Agriculture of the United States (the "Secretary") (JA 359).* Pennmarva Dairymen's Cooperative Federation, Inc. (Pennmarva), Intervenor-Appellee, filed a motion to intervene as a defendant (JA 20), which motion was granted.

Pennmarva is a federation of three cooperatives, Inter-State Milk Producers' Cooperative, Maryland Cooperative Milk Producers, Inc., and Maryland-Virginia Milk Producers Assocation, Inc. Approximately 60% of the milk marketed in the area comprising Federal Milk Marketing Order No. 4 (7 C.F.R. §1004) is produced and marketed by approximately 4,500 dairy farmers who are members of Pennmarva and its individual cooperative members.

In its opinion filed November 19, 1973, reported at 366 F. Supp. 1335, the Court below—per Carter, D. J.—held that the contested order provisions concerning the Federal Order No. 4 Base-Excess Plan are in accordance with law, justified by the Secretary's findings and supported by the Record and by marketing history in other regions.

Dairylea would have this Court believe that the Secretary was in league with Pennmarva in building a protective wall around Order 4 and that the Secretary is guilty of intentional "distortions of marketing order programs" in an effort to "appease" Pennmarva. Such assertions were rejected by the Court below.

Dairylea, as a Cooperative, markets the milk of its members. Dairylea receives payment for the milk it

* The designation JA refers to the Joint Appendix.

markets for its members, reblends the proceeds, and makes payment to its farmer members. In this case, while the milk in question was sold under Order 4, Dairylea paid its farmers only the Order 2 (7 C.F.R. §1002) blend price (JA 302). Any recovery by Dairylea in this action would have inured to the benefit of Dairylea rather than the individual farmers whose milk was involved (JA 303).

This action arose under the Agricultural Marketing Agreement Act of 1937. The Secretary and Pennmarva raised the issue of jurisdiction in the Court below for the reason that there is an administrative remedy available to Dairylea under section 608c(15) of the Marketing Act. Dairylea, however, argued that the principal issue in the case was an issue of fact, i.e., an issue of whether or not the base-excess plan of Order 4 operated in a discriminatory manner. Dairylea offered extensive testimony in an effort to prove this allegation. The record is replete with references to this issue and the fact that the Court below and Dairylea considered it to be the issue in the case (JA 42, 45, 119, 131, 133, 155, 156, 170, 171, 174, 175, 176, 254, 267). Thus, Dairylea based their case upon a factual issue and failed to meet their burden of proof. Having failed to meet their burden of proof, Dairylea now turns in this appeal to technical issues arguing that the base-excess plan provisions of Order 4 are now in accordance with law. The Court below, accepting jurisdiction, considered all of the issues and found the contested order provisions to be in accordance with law.

The Purpose of Milk Regulation

The declared policy of Congress expressed in The Agricultural Marketing Agreement Act of 1937, as amended ("Marketing Act") is for the Secretary

> "* * * to establish and maintain such orderly marketing conditions for any Agricultural Commodity enumerated in section 608 c (2) [milk] of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. 602 (4)

Thus, the Secretary is charged with the duty and responsibility of effectuating the provisions of the Marketing Act and, in so far as milk is concerned, in accordance with section 608 c (5) of the Marketing Act.

The Reason for the Contested Order Provisions

The findings of the Secretary, leading to the promulgation of the present provisions of Order 4 make it clear that the present Order provisions were necessary to prevent disorderly marketing conditions in Order 4. (The Findings and Decision of the Secretary with respect to the contested base-excess provisions are found in 35 Fed. Reg. No. 100, May 22, 1970, page 7924, *et seq.*, a part of the administrative record introduced at trial (JA 31)).

Prior to adoption of the present Order 4 base-excess plan, there was considerable abuse of the *former* base-excess plan in effect. The Secretary, discussing the prior base plan found:

"Because of the ease with which transfers can be accomplished under the current orders and because dairy farmers can earn full bases, even though the plant to which their milk is delivered is pooled as little as a single month *there has been considerable abuse* of the base-excess plan, particularly under the Delaware Valley Order.

"Plants normally associated with the New York-New Jersey market (Order 2), and even the Massachusetts-Rhode Island-New Hampshire market (Order 1) have shifted regulations to the Delaware Valley Order (in some instances for a single month) for the obvious purpose of acquiring bases for the dairy farmer patrons. Bases so acquired are then transferred to other producers in the Delaware Valley market. In other circumstances, deliveries from farms have been split so that only base milk is delivered to the Delaware Valley market, and what would otherwise have been excess milk is delivered as producer milk under another order. In still other circumstances, plants have shifted regulation to the Delaware Valley order during the base-operating period, which is the 'take out' period under the Louisville seasonal pricing plan under Order 2, and have then been returned to regulation under Order 2 to participate in the 'pay back' under the Louisville plan during the fall months.

"These *numerous abuses* of the base plan, which in many situations were also abuses of the Louisville plan under either Order 1 or 2, have resulted in considerable discontent on the part of many producers in the Delaware Valley Market.

* * *

"Proponents' fundamental purpose in making this proposal was essentially identical with that of proponents for a 12-month base plan; i.e., to encourage a continuing even pattern of production throughout

the year and to eliminate interorder shifts of plants and producers for the sole purpose of exploiting the different season pricing plants.

* * *

"As it has been indicated elsewhere in these findings, limitation on the transfer of bases as well as certain other terms of the order are being adopted *to correct the numerous abuses* which have attended the operation of the existing base plans in the separate markets, particularly in the Delaware Valley Market. The free transfer of the base, permitted by the existing base plans has resulted in a marketable value being attached to each base which, in turn, has led to trading in bases, and other conditions of market disorder such as the seasonal shift of producers onto the market primarily for base acquisition and subsequent sale. These abuses to the seasonal plans now effective in these respective markets as well as those in neighboring markets have thwarted the full effective operation of such plans." Emphasis supplied.

Secretary's Decision on Proposed Amendments to Marketing Agreements and to Orders, Federal Register, Vol. 35, No. 100, May 22, 1970, pages 7936 and 7939.

The numerous abuses of the prior base plan caused disorderly marketing conditions as a result of which dairy farmers suffered substantial financial losses. The Secretary, in carrying out the declared policy of the Agricultural Marketing Agreement Act of 1937, to wit: Section 602 (4), *supra,* carefully provided for new producers to come into the market while at the same time, providing for orderly marketing conditions. The Secretary found:

"Special consideration was proposed to accommodate bona fide shifting of producers between this order and Order 2. In light of limited base transfer provisions

the opportunity for exploiting the plan to the detriment of other producers is substantially reduced. It is possible, therefore, to adopt in the Order with respect to Order 2, a provision which has been applicable only among the three orders here being merged. Because there is a close interrelationship between the Order 4 and Order 2 markets and they do draw to a considerable extent upon a common supply area, producers should not be unduly inhibited from shifting between the markets.

"Milk would most logically be needed in this market during the short production months. It is provided, therefore, that for any farm from which the entire production was moved as producer milk under Order 2 during all or part of the August-September period, and thereafter was moved as producer milk under this order through December, a base shall be computed on the basis of the deliveries under both orders. Requiring that the milk all be delivered to this order during the last 3 months of the base-forming period will assure that the milk has been associated with the market when supplies are most needed.

"Under the transfer rules hereinafter discussed, there will be but limited opportunity for new producers to acquire bases by transfer. Appropriately, therefore, some provision should be made whereby new producers can acquire bases reflecting their performance in the market. Otherwise, new producers might be deterred from entering the market."

Secretary's Decision on Proposed Amendments to Marketing Agreements and to Orders, Federal Register, Vol. 35, No. 100, May 22, 1970, page 7937.

Operation of the present base-excess plan has tended to restore orderly marketing conditions in Order 4, eliminating the abuses of the Order referred to by the Secre-

tary, all in accordance with the declared policy of the Agricultural Marketing Agreement Act of 1937 (JA 252, 269).

Further, the Court below found that the Secretary's findings with respect to the disruptive effect of interorder shifts of milk plants and producers were "supported by the Record * * * and by marketing history in other regions" (JA 353).

Dairylea is a handler under the provisions of Order 4 and as a handler is subject to the terms of that order. (See testimony of St. Clair, Order 4 Market Administrator, JA 220, *et seq.*).

Summary of Argument

This action arose under the Agricultural Marketing Agreement Act of 1937. While Dairylea had available to it administrative review under section 608c (15) of that Act, nevertheless it sought review by the Court below primarily on a factual issue, alleging that the base-excess provisions of Order 4 operated in a discriminatory manner as to it. The Court below rejected that contention.

Dairylea does not attack the validity of the Marketing Act. The declared purpose of the Marketing Act is to confer upon the Secretary necessary powers to establish and maintain orderly marketing conditions. Pursuant to the authority granted by the Marketing Act, the Secretary is required to classify milk and fix uniform, minimum prices which handlers are required to pay to producers. These uniform, minimum prices are subject to certain adjustments

which the Secretary may impose pursuant to the provisions of the Marketing Act. One such adjustment is the base-excess provision of Order 4 here under attack.

There are other adjustments in addition to the base-excess provision which are permitted by the Marketing Act. The so-called Louisville plan and Class I base plan, like the base-excess plan, all attempt in an individual way peculiar to each plan to level production and thereby facilitate orderly marketing conditions.

The Marketing Act contains a provision which authorizes the Secretary to provide in a marketing order that a new producer entering a market, not having regularly sold milk in that market and thereby not having shared in the financial burdens of supplying that market, may be paid a price for his milk based upon the lowest use classification specified in the marketing order, subject to authorized adjustments, but for no more than three months. That provision is not applicable herein for the reason that in this case, the Secretary never imposed the lowest use classification upon Dairylea.

There is a trade barrier provision in the Marketing Act, relied upon by Dairylea, but it simply is not applicable since the base-excess provisions are specifically authorized by the Marketing Act.

Dairylea was a handler under Order 4 and therefore was subject to its provisions. The validity of the Marketing Act is clear and well settled and the application of the provisions of Order 4, pursuant to the Marketing Act, have been found by the Court below to be in accordance with law.

Thus, Dairylea has had its day in court and has failed to meet its burden to prove as a factual matter that the base-excess provisions of Order 4 operate in a discriminatory manner as to Dairylea or that such provisions are not in accordance with the provisions of the Marketing Act.

ARGUMENT

POINT I

Base-excess provisions of Order 4 are not discriminatory.

Dairylea has made much to do about alleged "discrimination" against Order 2 producers through use of the Order 4 base-excess provisions. Dairylea would like to paint a picture of all of the Order 4 producers conspiring with the Secretary to exclude Order 2 producers from Order 4.

The Court below exhaustively explored the issue of discrimination which it considered to be a primary issue. Obviously, the Court below found the contested provisions were not discriminatory in the unlawful sense.

The purpose of a seasonal incentive plan like the base-excess plan of Order 4 is to level production. (Leveling production means taking the peaks and valleys out of the normal annual production pattern. Milk production varies widely seasonally, more milk being produced in the spring than in the fall. In order to level out this production, farmers are encouraged to plan their production to meet the peak needs in the fall, rather than to glut the market in the

spring.) All of the witnesses agreed that it is necessary to level production in order to maintain an orderly market. It was pointed out by Dr. Hand (JA 247) that leveling production results in a benefit to producers and, ultimately, to consumers.

Dairylea, however, does not take issue with the need for leveling production but does take issue with the method chosen by the Secretary to accomplish this end.

In approaching this question, the declared policy of the Agricultural Marketing Agreement Act should be kept in mind. Section 602 (4) of the Act (7 U.S.C. 602 (4)) provides in relevant part:

> "Through the exercise of the powers conferred upon the Secretary * * * to *establish and maintain* such orderly marketing conditions * * * as will provide * * * an orderly flow of the supply * * * to avoid unreasonable fluctuations in supplies and prices." Emphasis supplied.

The federal order marketing system is complex and diverse. Each market is different, with different problems and different needs, each requiring a different approach to the problem of establishing and maintaining an orderly market (JA 251). Also, there are many common problems which the orders share but which, for one or more reasons, are solved in different ways. For instance, the Secretary found it appropriate to solve the problem of leveling production in Order 2 through the use of a Louisville plan but found that the base-excess plan is more appropriate for solving the problems in Order 4 (JA 351). A Louisville plan had been tried in a segment of the Order 4 market

and it was found to be unsatisfactory and did not serve the total market requirements (JA 281).

It should also be noted that when the Secretary promulgated the present Order 4 with its base-excess provisions, he was also faced with a unique problem which was creating disorderly marketing. The Secretary found that under the old base plan, plants were shifted from Order 2 to Order 4 for as little as a single month in order to acquire a base and then shifted back to Order 2 (JA 350). This practice, termed an abuse by the Secretary, caused disorderly marketing conditions (JA 351). The Secretary chose a course, the base-excess plan, which would correct those abuses and, at the same time, level production.

Balancing supplies and leveling of production are related problems (Balancing supplies means carrying enough fluid milk to meet the needs of the market, plus a reasonable reserve, and balancing is related to the orderly disposition of the reserve since there are differences in daily and seasonal demand requirements which do not relate exactly to the pattern of production) (JA 245). As the leveling of production in a market is improved, the burden of balancing supplies diminishes. The reverse is also true for to the extent that the leveling problem is not solved there is an increase in the burden of balancing supplies. Since the members of Pennmarva carry the principal burden in balancing supplies in Order 4, they have a financial interest in the leveling of production (JA 246).

The problem is not an easy one to solve. Leveling of production contemplates the leveling on a year round basis. There must be adequate supplies in the short period to

meet all the needs of the market but, at the same time, not an overabundance in the flush period. As explained by Dr. Hand (JA 246) Pennmarva bears the financial responsibility of balancing supplies and if producers not associated with the market are permitted to create disorderly marketing conditions, Pennmarva and its producer members would suffer financial losses in balancing the supplies. Thus, it is desirable to have the proper volume of milk associated with the market on an annual basis. A 12 month base-excess plan is one way to accomplish this. It sets performance standards for producers and if a producer wants to be associated with the market, it encourages him to stay in the market all year. This cuts to a minimum the shifting into and out of the market which had been creating disorderly marketing, which was imposing an unfair burden upon the members of Pennmarva and which the Secretary sought to stop (JA 251-253).

This does not mean that Order 4 is some sort of exclusive club, which Dairylea tries to portray. To the contrary, all producers, regardless of their location or marketing habits must meet the same standards. When the Order went into effect in 1970, all producers had to establish a base (JA 258-260). Each year, a producer must establish a new base regardless of whether or not he has been associated with the market in the past (JA 258). Therefore, even if a producer has been associated with Order 4, if he relinquishes his base or fails to establish an annual base, he would be subject to the same provisions of the Order as the producer members of Dairylea. There are no "insiders" or "outsiders." The only question is whether or not the producer meets the performance standards estab-

lished by the Secretary, which standards are geared to leveling of production and to eliminating the creation of an unfair burden on those producers who regularly supply the market.

In this respect, Dairylea's attack upon the order comes with little grace. If their producers intend to be permanently associated with the market, they should welcome the base-excess provision, for it will lighten their financial burden to the extent that as a permanent supplier of the market they may help to balance supplies. As their own witness, Mr. O'Brien, testified (JA 105) the result of the operation of the base-excess plan created, on a percentage basis, only about a 10 per cent reduction in income. This 10 per cent, as Dr. Hand explained, will be more than made up in a short period if they stay associated with the market (JA 294). If, however, they do not intend to remain associated with the market, then their shifting into and out of the market imposes an unfair burden upon those producers who remain in the market and will tend to create disorderly marketing conditions.

Dairylea would like to be free to shift producers into and out of the market as they were under the old plan, but that would simply lead to the same abuses condemned by the Secretary, which abuses place unfair burdens upon regular Order 4 producers. It would be manifestly unfair to permit Order 2 producers who chose to abuse the two orders, placing the burden for balancing supplies on others, to ride the crest of each order shifting into and out of the orders as the situation is to their advantage and not share the burden of balancing supplies in either order. This, as the Secretary found (JA 351), is an abuse of both orders.

The approach taken by the Secretary is not only reasonable, it is mandated by the Act. Section 608c(11)(c) of the Marketing Act (7 U.S.C. 608c(11)(c)) provides:

> "All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas."

The wisdom of the Secretary's decision is shown by the obvious success of the base-excess plan. The abuses referred to by the Secretary have been eliminated and leveling of production is being accomplished (JA 269). While different plans are in effect in different markets and each has different performance requirements as explained by Dr. Hand (JA 251), the performance requirements of Order 4 in the form of the base-excess plan are doing the job and helping to maintain orderly marketing conditions. As Dr. Hand explained (JA 260), if Order 4 did not have an adequate seasonal plan the effect on the market would be "catastrophic" because Order 4 would have a higher blend price in the flush season and would therefore draw unneeded supplies and the reverse would be true in the short season.

Dairylea would try to persuade this Court that the law requires producers to be paid "uniform prices" in the sense that all producers receive the same "actual" price. Dairylea reasons from this position that its producers, receiving less than the full base price received by producers with established bases, are discriminated against. Dairy-

lea's reasoning is, therefore, based upon a fallacious hypothesis.

Zuber v. *Allen,* 396 U.S. 168 (1969), clearly established that uniform price does not mean the actual price paid to the farmer. The Act provides for certain differentials to be added to or subtracted from the uniform price to arrive at the actual price. The differentials authorized include adjustments, such as the base-excess plan, to encourage seasonal production.

Since adjustments by way of differentials were provided for in the Act, it was recognized that it is not always possible to pay all farmers in a given market the same actual price and still have the market function in an orderly manner. The primary goal is providing by means authorized by the Act, for an orderly market.

Just as it is often impossible to please everyone, it is often impossible to achieve the goal of an orderly market without provisions which would be repugnant to some groups. In this sense, just about every differential in every Order throughout the country is repugnant to any group which is not benefited by such differentials. For instance, Order 2 uses a Louisville plan to level production. If a producer comes into the market during the take-out period but does not remain in the market during the pay-back period, that producer cannot recover the sums taken out and he receives a lesser actual sum for his milk on an annual basis as a producer who remains in that market for the pay-back period. Conversely, if a producer comes into the Order 2 market during the pay-back period and leaves the market before the next take-out period begins,

he receives a greater actual sum for his milk on an annual basis than a producer who remains in that market for the take-out period.

Thus, it is manifestly clear that some such Order provisions, in order to accomplish their purpose, cannot help but be repugnant to any group which is not benefited by them. If such repugnancy is unlawful discrimination, the federal order program would be a nullity.

POINT II

The Secretary may promulgate different marketing orders for different marketing areas each with different provisions as the Secretary finds necessary.

Dairylea suggests that its producers, associated with Order 2, should be permitted to enter Order 4 with full credit for their deliveries to Order 2. This is not only unreasonable, but also lacks economic justification and would foster disorderly marketing conditions under the existing scheme of regulation.

The thrust of Dairylea's argument appears to be that any farmer who marketed milk during the representative period of time of August through December (the base forming period), regardless of where the milk was marketed, is entitled to credit in Order 4 for that marketing. Such an interpretation is unreasonable, not in accordance with the Marketing Act and contrary to the principal of fostering orderly marketing through the use of regional marketing areas. If the milk were marketed in California during the representative period, would it be reasonable to give credit

for it in Order 4? The Secretary is concerned with leveling production in Order 4 and only the milk regularly associated with that market can be relied upon by the Secretary as being committed to that market.

Section 608c (11) of the Marketing Act dealing with "Regional Application" provides in relevant part:

> "(c) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas."

In order to effectuate the purposes of the Act, the Secretary has established marketing areas and promulgated marketing orders to regulate the marketing of milk in each of the orders. For instance, the Secretary established Order 4 regulating the marketing of milk in the Philadelphia, Baltimore and Washington, D.C., marketing areas separate and distinct from Order 2 which regulates the marketing of milk in the New York, Northern New Jersey marketing areas. Each of the orders has separate, distinct provisions determined by the Secretary as being the most appropriate to promote orderly marketing in each particular order. For instance, Order 2 has a seasonal incentive plan known as a Louisville Plan while Order 4 has a seasonal incentive plan, here being contested, known as a Base-Excess Plan. Both are authorized under sections 608c (5) (B) (ii) (d) and (e) of the Marketing Act and each

approaches in a different manner the problem of leveling production.

Clearly, the marketing of milk in Order 2 during the representative period had no economic value to, or leveling effect upon, Order 4. To give credit in Order 4 for the marketing of milk in other orders, where that milk did not share in the burden of leveling of production or balancing supplies in Order 4 during the representative period, would be inequitable to the producers whose milk is regularly associated with Order 4 and would permit those producers not regularly associated with the Order 4 to reap the benefits of the Order without bearing the corresponding burdens.

POINT III

Base-excess provisions of Order 4 do not violate Sections 608c(5) (B) or (D) of the Marketing Act.

A. The Secretary did not limit the base-excess plan under Section (D).

Section 608c(5) (B) (ii) provides for the payment to producers of a uniform price subject to certain adjustments. One of the adjustments specifically set out in sub-paragraph (d) is authority for the base-excess plan here under attack.

Dairylea argues that the Secretary's authority in promulgating the base-excess provision is limited by section 608c(5) (D). That section provides as follows:

> "(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order *for consumption in the area covered thereby, payments to such producer,*

for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in Paragraph (B) of this subsection." Emphasis supplied.

Accordingly, any new producer coming into the market may be paid the lowest use classification specified in the order "subject to the adjustments specified in paragraph (B) of this subsection." Therefore, it is clear that the Secretary had authority under the Act to promulgate a base-excess provision limiting the price to new producers to the lowest use classification. Here, however, the Secretary did not limit the price to the lowest use classification. Instead, he used the highest use classification and subjected it to the adjustment of sub-paragraph (5)(B)(ii)(d), clearly outside the scope or contemplation of section (5)(D).

B. Sections (d), (f), (D) and (G) are not interdependent.

Dairylea attempts to interpret sections (D) and (G) as though they were to be read and interpreted as part and parcel of sections (d) and (f). Such interpretation is misleading. To properly understand the relationship of these sections (d) and (f), it is necessary to read them in the light of the entire section (5)(A) and (B) of which they are a sub-part. Section (5)(A) is the classification section providing that milk be classified according to "the form in which or the purpose for which it is used" and providing for uniform prices to producers. Section (5)(B) is the "Proviso" section providing that the "uniformity

provision'' is subject to certain adjustments including the base-excess plan of (d) and the Class I base plan of (f).

Section (5)(D) is a separate provision, providing that the Secretary may subject new producers coming into a market to the lowest use classification in that market, but if he does so, he may not subject them to the lowest use classification for more than 3 months.

Section (5)(G) is the trade barrier clause. We will discuss this provision more fully in Point IV and show that it does not apply with respect to provisions specifically authorized by the Marketing Act.

There is nothing in the legislative history or the so-called Zwach Amendment which indicates a congressional intent other than as expressed above. In fact, to give effect to the interpretation espoused by Dairylea would substantially limit the ability of the Secretary to carry out the purpose of the Marketing Act to level production and maintain orderly marketing conditions for it would open the many separate markets of the Country to the type of uneconomic shifting of supplies between markets as the Secretary found to be disruptive and which he termed ''Abuses''.

C. Base-excess plan is tailored to production and not Class I sales.

Dairylea argues that the Order 4 base-excess plan is not authorized under the Marketing Act. They argue that the plan is not authorized because it is not one to level seasonal production but rather it tailors milk production to Class I (fluid milk) needs. This is an incorrect interpretation of the Order 4 base-excess plan.

As this Court undoubtedly recognizes, the Class I base plan authorized under section 608c(5)(B)(ii)(f) of the Marketing Act is a plan geared to Class I sales. That type of plan is tied to Class I sales and the producers' base is adjusted according to those sales. Thus, the Class I sales in the market determine the base of the producers in the market and the base of the producers will vary from year to year depending upon the Class I sales.

On the other hand, a seasonal incentive plan such as the Order 4 base-excess plan, authorized under section 608c(5)(B)(ii)(d) of the Marketing Act is a plan geared to producer production. The plan is tied to production rather than Class I sales. It differs from the Class I base plan authorized under (f) very substantially. Since it is geared to production, Class I sales do not affect the producers' base and they receive their base, established under the Order provisions, regardless of the Class I sales. A very different provision from the Class I base plan.

Dairylea attempts to imply that since the base-excess plan is intended to level production to meet the market needs, which includes Class I sales plus a reasonable reserve, it really is a Class I base plan and therefore not authorized under section (d). This interpretation displays a fallacious understanding of the base-excess plan. As discussed above, in a base-excess plan, the emphasis is on production in an effort to level production to relate it to meeting the market needs including Class I plus a reasonable reserve. As already pointed out, the base of producers under the base-excess plan remain the same regardless of the Class I sales since it is not tied to Class I sales. But

with a Class I base plan, a producer's base, being tied to the Class I sales, will vary from year to year or from one to three years depending upon Class I sales. Under a base-excess plan, a producer's base can only vary from year to year depending upon his own production performance. Or, put another way, a producer can affect his own base only by his own production under a base-excess plan. The level of Class I sales or the production of other farmers has no affect upon his base. But under a Class I base plan, a farmer's base is affected by the level of Class I sales and the production of other farmers in relation thereto and his base can vary depending upon the level of Class I sales which he has little or no control over. Clearly, Dairylea's argument is without merit.

D. Base-excess plan does not violate the uniformity provision.

As already discussed, the requirement of uniform price under section 608c(5)(B) of the Marketing Act does not mean actual price because the price is subject to certain adjustments authorized by the Marketing Act. One such adjustment is the base-excess plan which is specifically authorized under (d). *Zuber* v. *Allen, supra,* makes it clear that such adjustments, authorized by the Marketing Act, do not destroy uniformity.

Dairylea appears to rely upon the cases of *Brannan* v. *Stark,* 342 U.S. 451 (1952) and *Zuber* v. *Allen, supra,* to support its contention regarding the requirement of uniform price. Both the *Brannan* and *Zuber* cases, however, involved adjustments not specifically authorized by the Marketing Act and which could have been justified only as

"incidental to, and not inconsistent with" the other provisions of the Marketing Act and necessary to effectuate the provisions of the Order, under section 608c(7)(D) of the Marketing Act.

Brannan and *Stark* are clearly distinguishable from this case in that here the base-excess provisions are authorized by the Marketing Act.

POINT IV

Base-excess provisions of Order 4 do not constitute a trade barrier.

Initially, it should be made clear that all of the cases dealing with trade barriers under section 608c (5) (G) of the Marketing Act concern Order provisions not specifically authorized by the Marketing Act. That immediately distinguishes them from this case.

Dairylea seems to think that the case of *Lehigh Valley Cooperative Farmers* v. *U.S.*, 370 U.S. 76 (1962) is relevant and supports its position. The *Lehigh* case involved a provision in Order 2 which provided that if milk was brought into Order 2 from an area outside Order 2, the person who brought it in was subject to a payment which was called a compensatory payment. There the court held that *the rate of compensatory payment* was invalid. While holding that that specific provision was invalid, it did not strike down all compensatory payment provisions. See *Fairmount Foods Co.* v. *Hardin*, 442 F. 2d 726; *Lewes Dairy* v. *Freeman*, 401 F. 2d 308 (C.A. 3, 1968), *cert. denied*, 394 U.S. 929 (1969).

The order provision under attack in *Lehigh* was based upon the "incidental to, and not inconsistent with" provision of the Marketing Act (7 U.S.C. 608c (7) (D)) and not upon a specific authorization such as the base-excess provisions of Order 4. Since the base-excess provision is specifically authorized by the Marketing Act under section 608c (5) (B) (ii) (d), it could hardly constitute an illegal trade barrier.

Further, as clearly shown in the Secretary's Exhibit "A" (JA 225) substantial numbers of producers continually make the business decision to ship milk into Order 4 notwithstanding the fact that they do not have established bases. The base-excess provisions did not prevent or deter those producers from entering the market.

The Court below found that "Absolute equality among producers is not required by Section 608c (5) (G) or by Constitutional principles" (JA 355).

In *Lewes Dairy, Inc.* v. *Freeman, supra,* the Third Circuit upheld a provision which imposed full regulation upon a handler who did business outside the marketing area, thus placing him at a competitive disadvantage *vis-a-vis* unregulated, outside handlers. The Court found that full regulation was necessary in order to prevent an "open end" in the regulatory scheme.

The Court below reasoned that the inter-order shifts which threatened orderly marketing conditions in Order 4 were an "open end" similar to the "open end" in *Lewes* (JA 355).

In *Sunny Hill Farms Dairy Co., Inc.* v. *Hardin,* 446 F. 2d 1124 (C.A. 8, 1971), *cert. denied,* 405 U.S. 1023 (1972), a case involving a challenge to a location differential on

the grounds that it constituted an illegal trade barrier under the Marketing Act, the Court found the provision to be supported by the administrative record and in accordance with the Marketing Act, holding at page 1131:

> "But the differential is specifically authorized by the Act and reasonable under the circumstances of the case. It thus cannot be construed as establishing an illegal trade barrier * * *"

Dairylea attempts to distinguish the *Lewes* and *Sunny Hill* cases on the theory that they involved handlers not producers and that Dairylea is a producer.

That Dairylea was the handler with respect to all of the milk which is the subject of this action is clearly established in the record. Edward St. Clair, Market Administrator for Order 4, testified that a check of his records disclosed that plaintiff and Johanna Farms had not complied with section 1004.9(c) of Order 4, providing for notice to the Market Administrator if Johanna Farms was to be the responsible handler on the milk (JA 221, 234). Therefore, under the provisions of section 1004.9 of the Order, plaintiff was the handler with respect to all of the milk.

Mr. St. Clair explained the reasons why Johanna had been erroneously carried on his records as the handler of the Salem bulk tank milk (JA 222). The fact is that plaintiff was the handler and that fact is not changed by an administrative error. It is clear and well settled that the Market Administrator is bound by the Order provisions and an erroneous interpretation or administrative error by the Market Administrator is not binding on the Secretary. *Wetmiller* v. *Wickard*, 60 F. Supp. 622 (1944).

POINT V

The election provision of the base-excess provision is not discriminatory in that it grants to Order 4 producers no greater rights than the rights granted under Section 608c (5) (B) (ii) (d) of the Marketing Act.

Dairylea relies upon the case of *Vaughn-Griffin Packing Co.* v. *Freeman,* 294 F. Supp. 458 (M.D. Fla. 1968), affirmed 423 F. 2d 1094 (C.A. 5, 1970) to support its argument regarding the election provision.

The election provision essentially provides that an Order 4 producer can accept the base which he formed during the base forming months or relinquish that base and accept the base provided under section 1004.92(e) of the Order which would be the same as the base provided to any new producer entering the emarket.

While Darylea complains about the provisions of section 1004.92(e) of the Order, they fail to recognize the special treatment they receive under section 1004.92(c). That section provides:

> "For any producer who on August 1 was an Order 2 (New York-New Jersey) producer and who held such status in all or part of the 2 months of August and September and who otherwise was a producer only under this part for all of the remaining August through December period, the quantity of milk receipts shall be the total pounds of milk received from such dairy farmer by pool handlers under both orders throughout the August-December period."

Section 1004.92(c) is a special provision to provide for the orderly transfer of supplies between Order 2 and Order

4. It gives Dairylea special treatment and provides that its producers receive a full base if they are associated with Order 4 only three of the five base forming months. In other words, they can be associated with Order 2 during August and September and still get a full base in Order 4 if they ship to Order 4 for the months of October, November and December. In this light, Dairylea receives the preferential treatment under section 1004.92 in comparison with other orders.

In *Vaughn-Griffin* a handler of grapefruit who had been serving the market for a long time was receiving under the contested provisions less for his product than a new handler just entering the market. That factual situation is just the opposite of the factual situation of which Dairylea complains.

It should also be noted that *Vaughn-Griffin* was concerned with section 608c(6)(C) of the Marketing Act rather than section 608c(5)(B)(ii)(d) involved here.

While section (6)(C) concerns itself with a *uniform rule* to govern the marketing of product such as grapefruit, section (5)(A) and (B)(ii)(d) concern themselves with the *equitable apportionment* of the proceeds of the total sales of milk in the market.

A fact of life in dairying is that a farmer may have his production of milk affected by natural disaster such as flood or drought, disease in the cow herd or problems of a personal nature. Each year a farmer under the base-excess plan must establish a new base on his production during the base forming, representative period notwithstanding that

he may have been associated with Order 4 for many years. He is treated the same as any new producer. It should also be noted that a producer living in the Order 4 marketing area and shipping his milk to a non-regulated plant but who chose to come under Order 4 regulation would be required to form a base the same as any new producer coming into the market from Order 2. If a farmer is associated with the market and during the base forming period experiences disaster or disease in his cow herd which results in a base lower than the base a new producer would get just coming into the market, it would be discriminatory to that producer who has shared the expense of leveling production and balancing supplies in the market to not permit him to have a base at least equal to a new producer. To give him a lower base could well be the type of discrimination dealt with in *Vaughn-Griffin.*

Thus, the Court below found that the Secretary made the adjustment pursuant to (d) (JA 348):

> "* * * by allocating to each producer a base equal to his Order 4 marketings between August and December and giving it reduced payments for any deliveries made during the following flush season which exceed the base amount. Producers who enter the market during the flush season are not assigned reduced rates for all of the milk which they sell in Order 4, but are given a fixed base which varies from 50% to 70%, depending upon the time of entry into the market. Established Order 4 producers have the option of choosing between the fixed percentage base and a base determined by their production record during the base-making months."

This finding is clearly supported by the Hearing Record and the Order provision is authorized by the Marketing Act.

POINT VI

Base-excess provisions are supported by the Hearing Record and the Secretary's Decision.

As discussed earlier, the base-excess provisions were found by the Secretary to be necessary to promote orderly marketing in Order 4.

There are 12 month base-excess plans in other federal orders which are similar to the base-excess plan of Order 4. The fact that it is a 12 month plan does not make it unique.

The Court below inquired about the effect of the 12 month feature of the plan insofar as it affected Dairylea's producers coming into Order 4 in October (JA 292-294).

This question must be approached in the light of the totality of the problem of leveling production and balancing supplies. We have already discussed the problem of leveling production and that the members of Pennmarva carry the principal burden in this respect, as well as for balancing supplies. As Dr. Hand explained, it is desirable to keep producers associated with the market for the full 12 months of the year (JA 293) and if those producers leveled their production it can be readily seen that there would be an orderly market which would result in economic benefit to producers as well as to consumers (JA 248).

The performance standards of the Order reflect the relative value of the milk to the market based upon the month that it comes in. For instance, if milk comes in during August through November, the short period, it has

a higher value to the market than milk coming in during March through June, the flush period. Yet that milk does not have the same value to the market as milk associated with the market for a full 12 months. This makes sense, as we have already pointed out, for in order to level production those who supply the market must be able to calculate the approximate amount of milk which will be available to meet the needs of the market. This is done primarily on the basis of the milk regularly associated with the market. If other supplies are shifted into or out of the market, it can and often does disrupt the market. So the milk regularly associated with the market has a higher value to the market because the market can depend upon it and the market can perform with a relatively lower reserve supply. This value is reflected in the fact that if a producer elects to stay in the market a full 12 months, he gets a full base.

On the other hand, if milk comes in which is not regularly associated with the market or milk which is regularly associated goes out, its value to the market is diminished. This was the experience in Order 4 under the old base plan which the Secretary found was being abused by Order 2 suppliers. It was possible under the old provisions for Order 2 suppliers to shift into Order 4 for a short period of time in order to establish a base and then to shift back to Order 2 in time to take advantage of the Order 2 payback period. This, the Secretary found, was in fact being done and was creating disorderly marketing conditions. So, even though milk may come into the market during the short period, if it was not regularly associated with the market it may not be needed in the market and it does

not have the same value to the market as milk regularly associated for the reasons already discussed.

In order to make this type of plan work, it is necessary to have the producer performance standards which the Order contains. For example, in order to be able to calculate the estimated supply available to the market for the year 1972, we can look at what supply was associated with the market during the immediately preceding short supply period of the fall months of 1971. Since they were the base forming months for 1972, we know that we can pretty well rely upon that supply for 1972 and we can calculate the needed reserves. This method is proving successful. The producer who formed a base in the fall of 1971 is likely to remain in the market for the entire 1972 year because he will be rewarded for doing so by the fact that he receives a full base. If plaintiff's producers coming into the market in October 1971 to March 1972 (the new base period begins March 1972) it would disrupt the plans because the milk not having been associated with the market during the prior base forming period was not considered in estimating supplies. Those producers did not meet the performance standards of the Order and are not entitled to a full base for the October to March period, they are only entitled to the relative value which the milk has to the market which is reflected by the percentage of base provided in the Order.

Thus, it can be clearly demonstrated that the base-excess provisions of the Order are not discriminatory in the unlawful sense. They are authorized by the Act, based upon substantial evidence in the promulgation hearing record, are justified by the need to maintain an orderly market,

they do not preclude new producers from entering the market as is evident from the substantial numbers of producers shipping to the market without established bases (Exhibit D-A, JA 225), and they operate to fulfill a declared purpose of the Act, namely, to maintain an orderly market. The fact that the base-excess provisions do not benefit plaintiff, and therefore are repugnant to it, is not a valid basis to eliminate them.

Dairylea infers some ulterior motive of the Secretary in adopting a base-excess plan in Order 4 rather than a Louisville plan. The answer to the inference is clear and simple. A Louisville plan had been tried in the marketing area which is now Order 4 and found to be unsatisfactory and did not serve the total market requirements (JA 281). It is just common sense that producers regularly associated with Order 4 and bearing the cost of leveling production and balancing supplies would not want a plan already proven unsatisfactory. Under section 608c (9) of the Marketing Act, Congress has provided that a milk marketing order can be put in effect in a marketing area only if two-thirds of the producers affected by the order approve its provisions.

A base-excess plan was favored by the Order 4 producers and the Secretary found it was appropriate to meet the needs of the market. The fact that the base-excess provisions remain in Order 4 and continue to receive the approval of at least two-thirds of the producers and that as Dr. Hand testified (JA 273) Order 4 has a much more even variation in production, i.e., more level production, than under the old base plan, bears witness to the correctness of the Secretary's decision.

Conclusion

For the reasons stated herein and in the opinion of the Court below, the judgment of the Court should in all respects be affirmed.

Respectfully submitted,

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